

No.

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IN THE

**Supreme Court of the United States**

CAROLYN J. FLORIMONTE,

*Petitioner*

v.

BOROUGH OF DALTON, A.K.A. BOROUGH  
COUNCIL, ET AL

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION(S) PRESENTED**

I. WHEN THE LOWER FEDERAL COURTS ABANDON THE IMPERATIVES OF THE FIFTH AMENDMENT TO PROVIDE JUST COMPENSATION AND THE FOURTEENTH AMENDMENT TO PROVIDE EQUAL PROTECTION FOR AN EIGHTEEN YEAR TAKING, BY DENYING THAT IT IS A MANIFEST INJUSTICE AND EXPRESSING DISBELIEF OF FRAUD UPON THE COURT, DOES IT SET A DANGEROUS PRECEDENT FOR ALL LANDOWNERS WHOSE LAND HAS BEEN TAKEN UNCONSTITUTIONALLY BY GOVERNMENT?

II. WHEN AN ORIGINAL SUIT FOR CONTINUING TRESPASS IS CORRUPTED BY EXTRINSIC FRAUD AND FRAUD UPON THE COURT, DOES IT LEAD TO THE CORRUPTION OF ALL FOLLOWING COMPLAINTS, WHICH DEPEND ON THE ORIGINAL MERITLESS COMPLAINT, WHICH ARE THEN DISMISSED DUE TO RESPONDENT'S CLAIMS OF RES JUDICATA?

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**OPINIONS BELOW**

The Opinion of the U.S. Court of Appeals is not reported but is available at 18-1490 LAR 34.1 (a) (3<sup>rd</sup> Cir. 2018), Pet. App 1a-5a. The Order of the District Court, which adopts and incorporates the Report and Recommendation of the Magistrate Judge, is not reported but is available at 3:17-CV-1063 (3<sup>rd</sup> Cir. 2018) Pet. App. 6a-7a. The April 4, 2013, Opinion of the Commonwealth Court, which established a continuing trespass/taking, but failed to provide compensation, was heavily relied upon to support conclusions, resulting in dismissal of the Complaint. Pet. App. 42a.

**JURISDICTION**

The United States Constitution provides jurisdiction pursuant to Article III Section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.

Jurisdiction is also conferred pursuant to 28 U.S. 1254 (1):

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:  
(1) By writ of certiorari upon the petition of any party to any civil or criminal Case, before or after rendition of judgment or decree.

Jurisdiction is also conferred pursuant to 28 U.S.C. Section 1738. This Court retains jurisdiction under the Supremacy Clause as well as the Fifth and Fourteenth Amendments to the U.S. Constitution. This case arises specifically pursuant to the guarantees of those Amendments to the U.S. Constitution.

*Note: Numbers in parentheses refer to Appeal Court's Appendix Record.*

Review of the following judgments, orders and answers is requested:

The Judgment of the U.S. Court of Appeals for the Third Circuit entered on October 18, 2018. Pet. App. 36a. The Denial of Sur Petition For Rehearing entered on October 10, 2018. Pet. App. 38a. The U.S. Court of Appeals for the Third Circuit Opinion filed on August 24, 2018. Pet. App. 1a. The Order of the District Court filed on February 9, 2018. Pet. App. 6a. The Report and Recommendations filed on December 14, 2017. Pet. App. 8a. The Opinion of the Commonwealth Court of Pennsylvania, dated April 4, 2013. Pet App. 42a. Objections to the Report and Recommendations filed on December 27, 2017. (389) Petitioner's Response to Brief in Opposition dated January 26, 2018. (431) Appeal Brief filed on May 18, 2018. The Complaint filing dated June 16, 2017. (42)

A Request for an Extension of Time to File was filed on December 8, 2018. This Court approved the extension of time on January 8, 2019, with Petition for Writ of Certiorari revised filing due date of up to and including February 15, 2019.

## RELEVANT PROVISIONS INVOLVED

The U.S. Constitution provides that government may not take private property for public use without due process and compulsory just compensation. Following are the controlling laws which support Petitioner's claims for relief.

The U. S. Constitution, Article VI, Paragraph 2, Supremacy Clause; U. S. Constitution, Fifth Amendment; U. S. Constitution, Fourteenth Amendment, Section 1; 42 U.S.C. Section 1983; 42 U.S.C. Section 1985 (3); 28 U.S.C. Section 1254 (1); 28 U.S.C. Section 1738; F. R. C. P. Title VII Rule 60 (d)(1) & (3).

## STATEMENT

*Note: Numbers in parentheses refer to Appeal Court's Appendix Record indicating issues previously raised by Petitioner.*

### A. Foreword

The imperatives and duty imposed by the Fifth Amendment and Fourteenth Amendment to the U.S. Constitution make this a case of a grave miscarriage of justice contrary to assertions expressed in the Report and Recommendations, Pet. App. 19a, and the Opinion of the U.S. Appeals Court. Pet. App. 4a.

This Court's precedent setting decisions with regard to the requirement of just compensation which is an absolute guaranteed by the Fifth Amendment, cannot be denied or waived, Pet. App. 19a, (402-403), when

there is an actual occupation by government for public use, as in this case. "A promise to pay is implied because the duty is imposed by the Amendment." *Jacobs v. U. S.*, 290 U.S. 13, at 16, (1933).

The mandates of the Fourteenth Amendment's "equal protection clause" were validated by the prohibition of civil rights abuses, when litigants were provided recourse through claims of abuse under 42 U.S.C. Section 1983. Even a class of one alleging malice by government is protected by Section 1983 Civil Rights. See *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). (261-262).

These imperatives supersede any and all conclusions presented in the R & R, however, the District and U.S. Appeals Courts later affirmed those conclusions in order to dismiss this instant complaint. The only duty of the lower federal courts is to enforce the Fifth Amendment, not search for ways to dismiss the Complaint.

The lower courts cannot justify a failure to enforce the Fifth Amendment's just compensation required by its "takings clause" or a failure of the duty to protect Petitioner under the "equal protection clause" of the Fourteenth Amendment. These failures by the lower courts continue to endanger Petitioner and, by extension, endanger all landowners in the United States whose land may be taken by government without just compensation.

This case represents an eighteen year ongoing taking of private property for public use without just compensation, by Respondent. Additionally,

Respondent continues to violate the Fourteenth Amendment by refusing to protect Petitioner's Property, as it has all others, from the effects of storm water. The elements of the case are a direct result of Respondent's extrinsic fraud and fraud upon the court by the state court judge, claimed in this federal Complaint, as having tainted and invalidated every following complaint. (48, 63)

Respondent, to this day, has never admitted the true facts of a taking. Instead it has successfully distracted the lower federal courts, from a continuing Fifth Amendment taking, by blaming Petitioner, Pet. App. 19a, despite her initial willingness to provide a cost-free easement in 2001, in exchange for containment of Respondent's artificially redirected flooding which continues to overtake her Property, damaging her home, destroying her peaceful existence and ruining her financially, due to her inability to sell her flood damaged home.

Each fraud-enhanced complaint dismissal, has emboldened Respondent to continue to flood the Property, continuing to violate the Fifth and Fourteenth Amendments. Respondent's initial corruption and unconstitutional taking of the Property began long before Petitioner purchased the Property in 2000.

#### **B. Petitioner's Property**

The Property at issue in this case is a 1.3 acre parcel in the Borough of Dalton, Lackawanna County, known as 219 Third Street, Dalton, Pennsylvania. The deed to the Property is free and clear of any easements. (83-93)

It contains three parcels, each 100' x 200', which form a backward L. (75) It sits below a 26 acre newly created residential subdivision of homes, Huntington Woods. It is also at the lower end of 24 other residences on Third Street, but is not now and never has been the drainage collection area for all storm and sump water from the residential subdivision and the other Third Street residences. That collection point was and continues to be the former wetland located across the street at 224 Third Street, lot # 2. (75)

In the 1980's, half of the street was a dirt road, not yet fully populated by new homes. The last undeveloped property to be sold was the wetland at 224 Third Street, where drainage still collects. (46-49) The wetland was isolated from any other water source. In order to sell the wetland, Respondent conspired to convert it, in the 1980's, with truckloads of fill, into a viable lot then installed two pipes which were 18" in circumference on the property, Lot # 17. Pet. App. 74a-76. (75) This was done to benefit a member of Borough Council. (46-49, 75a-81) Those undisclosed actions by Respondent are claimed by Petitioner as extrinsic fraud. (76a-82)

The previous owners complained to Respondent when this occurred but were met with an attempt to extort the deed to Lot # 17 for \$1.00, which the owners refused to sign. Pet. App. 76a.

Unaware of these details or the flooding, Petitioner bought the Property in 2000, in part as an investment. Both pipes were hidden from view. The system of pipes was elaborate, passing under the street then emerging, but hidden, on Lot # 17 of the property, aided by a

commercial sump pump which Respondent installed in the front yard of the wetland, Lot # 2. No reasonable person would believe that anyone other than Respondent could have created such an intricate system or, logically, for any purpose other than disposing of displaced wetland water yet Respondent, continues to deny responsibility, never acknowledging its complicity or duty to protect Petitioner as it has others. The lower courts have ascribed to this claim thus allowing Respondent to escape just compensation.

By 2000, Respondent had already engaged in corruption, a specious conspiracy, destruction of a wetland and a taking without just compensation. All are the basis of the extrinsic fraud claimed in this instant complaint. Respondent withheld this information from Petitioner and the Courts (46-49, 75a-81), both state and federal, in order to hide "unclean hands." Respondent refused to vacate the Property thus causing protracted, unnecessary litigation.

The History of this case is lengthy. It is fully described in the original filing of June 16, 2017, (42-179) and in the Appeal Brief of May 18, 2018, pp.5-6.

In the summer of 2018, Respondent intentionally, maliciously raised the level of the two properties where the storm water still collects, thus ensuring that the collecting water crosses Third Street, raging onto the Property, causing continuing damage and health issues as well as a continuing taking, at times entering the home, thus destroying any use or enjoyment of the property. *See photos.* (173-179)

This case is not presented to the Court for purposes of complaining of state court errors, but rather to

complain of the state court judge's fraud and allege the wrongful acts and conspiracy which Respondent used to manipulate the courts and gain dismissals, thus denying Petitioner's right to just compensation for an eighteen year invasion of her private property. *See Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140 (2004). (236, 245-249)

### **C. First Instance of Declaration of a Taking**

The first instance of a statement that Respondent was involved in a de facto taking was raised in 2002. (99-100). Since becoming pro-se on June 16, 2009, Petitioner has raised the U.S. Constitution and the Fifth Amendment in every document filed by her, beginning with the 2009, Request for a Preliminary Injunction. Pet. App. 74a-76a.

In that document, Petitioner, stated that the pipes on her land were an "illegal seizure/Taking" by Respondent. Pet. App. 74a:

In diverting water onto lot # 17, in the 1980's the Defendant disregarded the 1978 Environmental Protection Act, converted a wetland and illegally seized lot # 17, 219 Third Street, Dalton, PA, without the owners' consent or knowledge. This illegal seizure/Taking makes any and all claims of an easement invalid.

Extrinsic fraud by Respondent was first confirmed. Pet. App.75a:

At the April 3, 2009, Injunction Hearing, Plaintiff's witness, Robert Fisher, testified that the area across from 219 Third Street was a



swamp and Defendant's witness, Stanley Hedrick, testified that the location where the home at 224 Third Street, Dalton, PA, now stands was a wet, swampy area and that the conversion and redirection of water onto lot # 17, 219 Third Street, Dalton, PA, occurred in the 1980's...

If, as testimony indicates, the area, now known as 224 Third Street, Dalton, PA, was a true wetland, the proposed alteration must have included an alternate site, provided by the altering party, of significantly larger size to replace the actual wetland.

The U.S. Army Corp of Engineers would never approve the Taking of a property owners land for that purpose, without a firm, signed agreement, which would shield the Environmental Protection Agency from the possibility of loss of the alternate wetland, which replaced the original wetland. The Defendant did not contact the EPA and no signed agreement exists regarding the use, by Defendant, of lot # 17, 219 Third Street, Dalton, PA, for any purpose at all. The use by Defendant of Plaintiffs property is illegal.

The U.S. Constitution was first raised. Pet. App.  
76a:

Plaintiff's Motion of May 21, 2009, thoroughly examined the various Easement claims, Adverse Possession, Grandfather's, prescriptive and implied presented by Defendant at the April

3, 2009, Injunction Hearing, as well as Plaintiff's Property Rights guaranteed by the Fifth Amendment of the Constitution of the United States and in every instance, refuted the Defendant's claim of an easement.

Despite Injunction Testimony by two witnesses confirming Respondent's installation of the pipes in the 1980's, the state court judge would deny Injunction on October 6, 2009, (303) stating that Respondent "cannot accurately determine when these pipes were installed and by whom" (309), concluding that "the removal of the pipes would create a safety hazard on Third Street." (312) He would deny Summary Judgment, then dismiss the case in its entirety on December 28, 2011.

#### **D. First Instance of Raising the Fourteenth Amendment**

The first instance of raising the Fourteenth Amendment was in the filing of 10-CV-7822 on November 1, 2010, Nature of the Case: Violations of the Fifth and Fourteenth Amendments- U.S. Constitution, Violations of PA. Constitution with these words:

AND NOW COMES, the Plaintiff, Carolyn J. Florimonte, pro se, to file the following Complaint against Defendant, the Borough of Dalton, pertaining to constitutional violations and the Piercing of the Fifth Amendment's Takings Clause and Fourteenth Amendment's due process and equal rights Clause, as incorporated against the States, of the United States Constitution...

On November 11, 2011, the same state court judge adjudicated the Complaint and would continue his protection of Respondent by dismissing it stating that Petitioner had failed to follow eminent domain proceedings.

#### **E. First Instance of Extrinsic Fraud**

The first instance of extrinsic fraud occurred on July 19, 2002, when Respondent, began to deny responsibility for the pipes located on and delivering overwhelming flooding to the Property. (101)

Since that time Respondent has continuously denied knowledge of who placed and hid the pipes on the Property, when they were installed on the Property or why such an action was taken, despite Injunction Testimony blaming Respondent. Pet. App. 75a. (48-49, 75-83), thus corrupting the original Complaint of 2003, and every following complaint filed for the continuing trespass/taking.

#### **F. First Instance of Fraud Upon the Court**

The first instance of fraud upon the court was established when the state court judge denied an injunction (303-313) despite hearing testimony by Respondent's own witness of Respondent's culpability for the taking; despite an in-person viewing of the pipes on the Property; despite existing laws which refute his conclusions, thus imposing a servitude upon Petitioner, making only her Property responsible for the safety of Third Street, Dalton, PA.

On April 3, 2009, the first Injunction Hearing testimony would reveal that Respondent had installed the pipes in the 1980's but not why. Transcript testimony on that date by Robert Fisher as he was questioned follows:

Q. You think the pipes under Third Street were there at least back into the eighties?

A. That's when Hedricks lived there they were put in.

Q. Might have been there before or you're not sure?

A. I'm not sure. I know it was back in the eighties because they just moved up there I believe. I'm not sure when they bought the property, but I know they came home one day and the pipe was in.

They were quite mad.

On May 1, 2009, a later Injunction Hearing occurred, during which Respondent's *own witness*, Hedrick, would testify that Respondents installed the pipes in the 1980's. Testimony was followed on the same day by the state court judge's in-person viewing of the pipes on the Property.

On October 6, 2009, the state court judge would ignore this Injunction testimony and his own visit to the Property, in order to deny an Injunction.

*Respondent would use this denial to gain dismissal of all following suits.* Petitioner employed every possible avenue to remove her cases from the judge's purview, wrote letters to the Court Administrator requesting a different judge or a change of venue;

demanded recusal which he declined; then successfully overturned the December 28, 2011, dismissal of the 2003 Complaint. Pet. App. 42a-67a.

To date, the state court judge's fraudulent rulings, continue to provide an escape from just compensation, and continue to follow Petitioner, even into federal court.

#### **G. Proceedings in the State Courts**

After purchase in May, 2000, Petitioner discovered a hidden pipe gushing sump and storm water onto the Property. Immediately after informing Respondent, she was assured that the problem would be corrected.

In 2001, Respondent demanded an easement in exchange for containment of the flooding. Easement preparation by Solicitor for Respondent, as promised, never materialized. Respondent then hand dug an undiscussed, unauthorized trench (95-96, 121-123) front to back on the property, further evidence of a taking.

In 2002, Respondent, began to claim a long custom of the pipes on the property and therefore it was "a private property concern." (101) Respondent continued to remain on the Property, ignoring multiple cease and desist demands while diverting runoff from new homes to the Property.

On March 4, 2003, Counsel for Petitioner filed an Equity Complaint. (107-111)

In 2007, Respondent claimed a false prescriptive easement, without amending.

After years of attempts to properly resolve the flooding, the document of January 29, 2009, Pet. App. 71a-72a, from Counsel, indicates Respondent's persistent presentation of proposals which would continue to devalue the Property.

The document of February 12, 2009, Pet. App. 69a-70a, indicates that the judge was unsure if damages for a secondary owner could be claimed in the matter. Also indicated is Respondent's proposal to use a rock swale "to slow down the water before it enters Mr. Fisher's property." Pet. App. 69a-70a Respondent's intention of containing the flooding only to unleash it onto Fisher's property was unacceptable.

The state court judge was determined to absolve Respondent of all fault in the matter of just compensation, despite testimony during Injunction Hearings on April 3, 2009, and May 1, 2009, that the hidden taking of the Property occurred at the hands of Respondent in the 1980's. Pet. App. 74a-76a.

The first instance of fraud upon the court, began with the state court judge's denial of an Injunction on October 6, 2009. (303)

This denial was followed by Petitioner's filing of additional complaints. *See Lake v. The Hankin Group, et al*, No. 278 C.D. (2013) at 13.

On October 26, 2010, Petitioner's focus of Summary Judgment was the Taking, the U.S. Constitution, the Fifth Amendment, legal precedence and Injunction Testimony. The state court judge would twice deny a stenographer, then mock and deride Petitioner (369-

385), refusing to hear testimony from Injunction Hearings saying, "We are done with that!" (383) Then asked, "What place does the Fifth Amendment have in a local county courthouse?" (317) The state court judge blocked Petitioner's continuing efforts to include testimony which established that Respondent had installed the pipes in the 1980's. Further, he would refuse to provide judicial notice of the pipes or the Fifth Amendment and denied any attempt to claim a taking.

On November 30, 2010, the judge would deny Summary Judgment. (321-322)

*Respondent would use this denial to gain dismissal of all following state complaints.*

On August 10, 2011, prior to trial, the judge would deny his own recusal. During the very beginning of the trial, Petitioner would request compensation for the continuing trespass. Pet. App. 73a, (403, 412, 429, & Appeal Brief, p. 35)

*Judge: So if you want relief what relief are you going to be asking for? The removal of the drainage ditch and the pipe, is that what you're requesting?*

*Florimonte: Yes, and I have included in there for trespass. I asked for some sort of compensation for the trespassing of those years.*

At no time did Petitioner waive her right to just compensation or the right to sue for a taking.

On December 28, 2011, the judge would dismiss the 2003 Complaint, stating “there was no trespass,” by altering Petitioner’s trial testimony. (353-368)

*Respondent would use this denial to gain dismissal of following federal complaints.*

On February 8, 2012, Petitioner filed a complaint with the Judicial Board of Pennsylvania, describing fraudulent actions by the state court judge. (369-385)

On February 10, 2012, Petitioner filed a Statement in Absence of Transcript, which the Honorable Michael J Barrasse approved on March 23, 2012. (315-320)

On April 4, 2013, the Commonwealth Court would reverse the December 28, 2011, decision. This Opinion,(207-230) invalidates the state court judge’s rulings in the 2003 Equity Complaint:

Furthermore, the evidence clearly shows that the Borough maintains this artificial diversion of surface water onto the Property for the benefit of Third Street, The Borough argues that a central point in this case is the fact that removal of the pipes would cause water to pond on Third Street and would create freezing and icy road conditions in winter, amounting to a public hazard. However, the fact that the Borough’s diversion of surface water onto the Property benefits the road is not material in an analysis of whether or not the Borough is liable for trespass, nor does a benefit to the road or the public transform a recoverable loss into a loss without injury. Pet. App. 60a



The Opinion verified that there was a continuing trespass but failed to award just compensation, stating “that without an admission of responsibility, there is no duty, therefore, no compensation was available.”(223)

At no time during this litigation did the Borough represent that it installed the pipes or that it had knowledge of who may have installed the pipes. Without proof that this Borough performed the act of installation or Construction, Appellant’s negligence claim cannot be sustained; without the act, there is no duty, and without a duty, there can be no breach. Pet App. 56a

On July 25, 2013, the state court judge, as compelled by the Commonwealth Court, would order removal of the pipes by September. (230a-230h)

In September, 2013, the pipes were removed from the Property and remaining portions were blocked by cement as requested by Petitioner.

In December, 2015, the judge would retire from the bench of Lackawanna County, only four years into his ten year term, to pursue a “bucket list.” (387 )

On September 26, 2016, the final state case, 16-CV-3588, for Pa. Code, Chapter 85, Statute 8542(b)(6)(i) violations would be heard. A Motion for Extrinsic Fraud was filed in this case, but the Judge refused to hear the Motion. In court, opposing counsel would personally attack Petitioner, indicating that the state court judge had been punished because of her complaint to the Judicial Board:

And I believe, and I don't think that I'm speaking off the record here, or out of school, despite how painstaking Judge Mazzoni was, and how gracious he was to her at trial, I believe he ended up on the wrong side of the stick with a complaint being made against him to the Judicial Board. So she may come across very sweet and very pleasant, but she will not stop unless there is some pain that is imposed upon her... Pet App. 68a

Petitioner alleges fraud upon the court by the state court judge, whose biased rulings in the original Equity Complaint of March 4, 2003, negatively prejudiced every later lawsuit, both state and federal, rendering them invalid, as well as the deliberate use of those prejudiced dismissals, *after April 4, 2013*, to defeat the federal Complaints filed on February 25, 2014 and June 16, 2017.

#### **H. Proceedings In Federal Court.**

The first federal complaint was a Section 1983 Civil Rights Complaint, filed on February 25, 2014. Respondent, through its counsel, provided the meritless state court complaints. Petitioner was denied the right to amend. Petitioner did claim in the first federal suit that Respondent had "unclean hands" and described corrupt actions by Respondent but fraud was not the basis of the suit. The first federal suit was dismissed without prejudice due to *Roquer-Feldman*.

Opposing counsel deceived the federal courts, on behalf of Respondent, by fraudulently presenting the meritless, dismissed state complaints to the federal court in 2014, which resulted in the Section 1983,

dismissal. Respondent and its counsel already knew in 2014, when it presented the invalid state complaints to the federal court, that those complaints were adjudicated based on the state court judge's prior rulings which were overturned by the Opinion of the Commonwealth Court of Pennsylvania, on April 4, 2013. Pet. App. 42a-67a.

On June 16, 2017, Petitioner filed this instant complaint for Extrinsic Fraud And Fraud Upon the Court. (42-179) Again Respondent is using the corrupted prior dismissed complaints to claim *res judicata*.

The continuing use of prior dismissed complaints, based on the now reversed state court judge decisions constitutes fraud upon the court by opposing counsel.

Petitioner timely appealed from a final dismissal and closure entered pursuant to a decision by the United States District Court for the Middle District of Pennsylvania, dismissing all of Petitioner's claims under Federal Rules of Civil Procedure Rule 12 (b) (6) failure to state a claim, which relies on the inapplicable theory of *res judicata* and a magistrate judge's disbelief. The Appeals Court denied appeal on August 23, 2018. Rehearing was denied on October 10, 2018 with Judgment certified by seal on October 18, 2018.

An extension of time was requested on December 8, 2018, which was approved on January 8, 2019, up to and including February 15, 2019.

Federal jurisdiction for a review of the United States Court of Appeals for the Third Circuit is

conferred by the U.S. Constitution's Supremacy Clause; the Fifth and Fourteenth Amendments; 28 U.S.C 1254 (1); 28 U.S.C. 1738; and F.R.C.P. Title VII Rule 60 (d)(1) and (3).

### **REASONS FOR GRANTING THE PETITION**

The lower federal courts have failed to uphold the U.S. Constitution and protect as mandated by the Fifth and Fourteenth Amendments, declaring that the taking is not a manifest injustice Pet. App.3a, 19a, thus continuing to endanger Petitioner, which exponentially endangers all private property owners. This is a case which confirms the old adage of "not seeing the forest for the trees." The forest is the lengthy taking of private property. The trees are reasons to dismiss which do not apply to uncompensated takings by government.

#### **I. The United States Court of Appeals for the Third Circuit Has Entered A Decision In Conflict With the Fifth and Fourteenth Amendments to the United States Constitution.**

##### **A. The Scope of Courts to Uphold the Constitution**

The Fifth Amendment brooks no excuses or reasons for not enforcing its provision of just compensation for a governmental taking without due process. The only duty of the lower courts is to provide just compensation for a taking, not search for reasons to deny that compensation, as this Court has found repeatedly.

If the meaning of the Fifth Amendment is clear, “and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.” *Caminetti v. United States*, 242 U.S. 470, 485 (1917). See also *Lake County v. Rollins*, 130 U.S. 662, 670-671 (1889); *Bate Refrigerating Co. v. Sulzburger*, 157 U.S. 1, 33 (1895); *United States v. Bank*, 234 U.S. 245, 258 (1914); and *United States v. Lexington Mill and Elevator Co.*, 232 U.S. 399, 409 (1914): “If this purpose has been effected by plain and unambiguous language and the act is within the power of Congress, the only duty of the courts is to give it effect according to its terms.

True takings are rare but, once established, Pet. App. 9a, (7) are governed by rules which overcome *res judicata*. In this case, the Third Circuit and the Appeals Court abandoned the imperative of the Takings Clause of the Fifth Amendment and the “equal protection clause” of the Fourteenth Amendment to provide just compensation when government invades and physically occupies private property for public use, without due process. See *Loretto v. Teleprompter Manhattan CATV Corp. Et Al*, 458 U.S. 419, 421, (1982).

When government permanently affixes an object to a property, without just compensation even in the case of a secondary owner, it is a taking.(436, 442) See *Loretto v. Teleprompter*, 458 U.S. 419, at 420-421.

Despite being described as a trespass, as in this case, when government is involved, it is a taking without due process or just compensation.

The federal courts rather than being offended by Respondent's affront to the U.S. Constitution have instead failed to enforce Constitutional law pertaining to takings or to compel Respondent to fulfill its duty to protect Petitioner.

**B. Latitude of Lower Federal Courts to Declare A Taking of Private Property Without Just Compensation Is Not A Manifest Injustice**

The lower federal courts liberty to decide that a confirmed taking by government without just compensation is not a "grave miscarriage of justice" Pet. App. 3a,19a, is prohibited by this Court's consistent rulings regarding takings. A governmental taking without just compensation is a manifest injustice which cannot be condoned,

This Court has held that governmental occupation without compensation or due process is a manifest injustice. See *Loretto v Teleprompter*, at 435:

The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property, cf. *Andrus v. Allard*, 444 U.S.51, 444 U.S. 65, 66(1979), the government does not simply take a single "strand" from the "bundle" of property rights: it chops through the bundle, taking a slice of every strand...

Moreover, an owner suffers a special kind of injury when a stranger directly invades and

occupies the owner's property. As Part II-A, *supra*, indicates, property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv.L.Rev.1165, 1228, and n. 110 (1967). Furthermore, such an occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent or nature of the invasion. See n19, *infra*.

Also see *Loretto v. Teleprompter*, at 437:

Finally, whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute. Once the fact of occupation is shown, of course, a court should consider the extent of the occupation as one relevant factor in determining the compensation due.

In this case, trespass by Respondent, a governmental municipality, is actually a still continuing taking without just compensation, which continues to endanger Petitioner and for which she has repeatedly requested just compensation.

## **II. The Lower Federal Courts Have Entered Decisions Which Conflict With Other District Court And U.S. Supreme Court Opinions**

The Third Circuit's analysis of the case begins by describing the complaints, which grew out of the original fraudulent Complaint of 2003. This approach fails because every case being reviewed is tainted by fraud.

The dismissal is egregious, erroneous and demonstrates an abuse of discretion. The District Court must accept as true, all supported allegations in the complaint, but the stance of that Court is to advance dismissal by complaining of the suits filed. "This is the twelfth civil action initiated by the *pro se* plaintiff, Carolyn Jane Florimonte, in a property dispute that has more lives than a cat." Pet. App. 8a.

There are numerous errors in the R & R, all of which were disputed, by other District and Supreme Court opinions, in the Objections to the R & R. (389-419).

The District Court tested the complaint by the wrong legal standard. Pet. App. 21a-23a; denied the existence of a manifest injustice, Pet. App. 4a,19a; claimed that Petitioner had "waived her takings claim and any claims for money damages, Pet. App. 9a,19a; failed to consider continuing flooding/trespass law in Pennsylvania Pet. App. 9a; unlawfully expressed disbelief of evidenced contentions of fraud. Pet. App. 17a- 26a; failed to discern the duty of government to be transparent and forthcoming during litigation App. 17a-26a; misconstrued the issue of extrinsic fraud, Pet. App. 21a-27a; stated that federal courts can only provide



relief from “*federal* judgments or orders,” Pet. App. 19a; as well as stating that the fraud should have been brought forth in the 2003 Complaint, Pet. App. 6a, 26a when during those proceedings, the state court judge denied any inclusion of Injunction Testimony, in order to shield Respondent from any implications of a taking; and further, claimed that an order of remand compelling the judge to provide equitable relief was a decision in Petitioner’s favor. Pet. App. 26a.

### **A. Statute of Limitations**

The Third Circuit erred in claiming that Petitioner raised the issues of fraud too late. Pet. App. 22a. A judgment procured by fraud is not a valid decision and is never final. So *held* in *Burke v. United States of America*, U. S. District Court for Eastern District of Pennsylvania, No. 96-3249 at 6:

“There is no statute of limitations for bringing a fraud upon the court claim. *Hazel-Atlas*, 322 U.S. at 244. As a circuit court has explained, “a decision produced by fraud on the court is not in essence a decision at all and never becomes final.” *Kenner v. Comm’r of Internal Revenue*, 387 F.2d 689, 691 (7<sup>th</sup> Cir.1968).’

The lower courts have imposed an arbitrary time frame for bringing fraud claims. Contrary to that assertion, there is no time limit for fraud upon the court complaints. This Court addressed timeliness in instances of fraud, in *Hazel-Atlas*, stating that it does not condone fraud, no matter when it is raised. Quoting *Hazel-*

*Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 244-245 (1944):

The Circuit Court did not hold that Hartford's fraud fell short of that which prompts equitable intervention, but thought Hazel had not exercised proper diligence in uncovering the fraud and that this should stand in the way of its obtaining relief. We cannot easily understand how, under the admitted facts, Hazel should have been expected to do more than it did to uncover the fraud. But even if Hazel did not exercise the highest degree of diligence Hartford's fraud cannot be condoned for that reason alone.

**B. Waiving of Just Compensation and Additional Damages**

Petitioner has never waived just compensation and additional damages. Pet. App. 9a, 19a. Compensation for trespass was requested at Trial on August 10, 2011, Pet. App. 73a. (403, 411-412, 429 and Appeal Brief, p. 35), for years of occupation of her property, as indicated herein, *Part G. Proceedings in the State Courts*. It would be irrational to bring this case before the Court specifically for purposes of obtaining just compensation which has been denied to her for eighteen years, by Respondent's fraud, if she had waived compensation.

The absolute duty imposed by the Fifth Amendment of just compensation for a proven trespass/taking by government cannot be waived. Rather than being cognizant of the Fifth Amendment, the lower federal courts have failed to protect Petitioner.

Further, other complaints for additional damages had already been filed, which indicates those issues were not waived. Those filings were provoked by the state court judge's questioning of damages, Pet. App. 69a; his bias during Summary Judgment. (369-385) and his denial of all attempts to hold Respondent at fault.

### **C. Federal Courts Ability to Set Aside State Complaints**

The lower courts claim that federal courts may not set aside state complaints, except in narrow circumstances. Pet. App. 17a-19a. This is in direct opposition to the this Court's decision in *Barrow v. Hunton*, 99 U.S. (9 Otto) 80, 25 L. Ed. 407 (1878). See *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1141 (9<sup>th</sup> Cir.) 2004:

It has long been the law that a plaintiff in federal court can seek to set aside a state court judgment obtained through extrinsic fraud. In *Barrow v. Hunton*, 99 U.S. (9 Otto) 80, 25 L. Ed. 407 (1878), the Supreme Court distinguished between errors by the state court, which could not be reviewed in federal circuit court, and fraud on the state court which could be the basis for an independent suit in circuit court...

Petitioner has claimed extrinsic fraud by Respondent in both state and federal courts, which, as the above controlling law determines, is a true path to justice.

Further, Rule 60 (d) (1), also known as the savings-clause provision, frees a litigant from the imposition of

the one-year filing limit for fraud. Petitioner, aware of the one-year time limit on filing a request for Relief from a Judgment or Order, filed an independent action under F.R.C.P. Rule 60 (d) (1) *entertain an independent action to relieve a party from a judgment, order or proceeding*; and (d) (3) *set aside a judgment for fraud on the court*.

#### **D. Continuing Trespass Theory**

By focusing on the number of complaints filed, the lower courts have disregarded that the state complaints filed would be governed by the Pennsylvania Appellate Courts' decisions regarding *a continuing trespass*, Pet. App. 9a, as grounds to file suit for every day during which the trespass continues. *See* Appeal Brief pp.20-21.

*See* also Reply Brief pp.7-8.

The issue of continuing flooding, is stated in the Complaint. (46). The R & R calls attention to the continuing trespass, Pet. App. 9a, but fails to realize that an ongoing trespass and occupation by government is a taking. Or that every day of a continuing trespass, creates a new cause of action. The nature of a continuing trespass, as stated in the Appeal Brief pp. 20-23, is described in

Regarding continuing trespass in *Lake v. The Hankin Group, et al*, No. 278 C.D. (2013) at 13, the Commonwealth Court of Pennsylvania *held*:

The comment to Subsection 1 of Section 161 of The Restatement (Second) of Torts provides, in pertinent part:

b. *Continuing trespass.* The actor's failure to remove from land in the possession of another a structure, chattel, or other thing which he has tortuously erected or placed on the land constitutes a **continuing trespass for the entire time during which the thing is wrongfully on the land and...confers on the possessor of the land an option to maintain a succession of actions based on the theory of continuing trespass** or to treat the continuance of the thing on the land as an aggravation of the original trespass...

Illustration:

1. A, without B's consent or other privilege to do so, erects on his own land a dam which backs up water on B's land. This is a trespass, which continues as long as A maintains his dam in such a way as to flood B's land. (Emphasis added)

The above words, "*confers on the possessor of the land an option to maintain a succession of actions on the theory of continuing trespass,*" verify Petitioner's contention that she was and still is entitled to file numerous actions due to Respondent's continuing failure to end the illegal flooding of her property.

By law, it is possible that Petitioner could still file state complaints for every day of the *still* continuing flooding/trespass by Respondent.

### **E. Enforced Servitude For Public Interests**

The actual nature of a taking, especially by occupation and flooding, causes ongoing, overwhelming distress for a homeowner. It constantly disrupts life and enjoyment of property, entails ongoing Section 1985 civil rights abuses and allows government to abandon its duty to protect equally. It is indeed, a "grave miscarriage of justice" although denied by the lower courts. Pet. App. 4a, 19a.

It creates a servitude by placing burdens on the landowner, which, by right, are public responsibility. Government may not impose servitude for public interests, on one person by taking her property without just compensation, *Nollan v. California Coastal Commission*, 438 U.S. 825, at [Footnote 4] (1987),

One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all justice and fairness, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 364 U.S. 49 (1960); see also *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 450 U.S. 656 (1981); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 438 U.S. 123 (1978).

The federal courts have failed in their duty to enforce the Fifth Amendment, further failing to protect Petitioner as required by the Fourteenth Amendment.

### **F. Just Compensation And Interference With Property Interests**

Just compensation usually provides compensation for elapsed time of the taking and actual physical damages, however, this Court has found that compensation may also apply only to deprivation of property, which occurred while solutions were pursued unsuccessfully. In the *Del Monte Dunes* case, a lawsuit was filed suing the City of Monterey for years of deprivation of the property, while disputes over proper use of the land went on indefinitely. *See City of Monterey v. Del Monte Dunes at Monterey LTD*, 526 U.S. 687 at 714-715, (1999).

Federal and state law both concur that a trespass/taking is not required to include actual physical damages. "The landowner's right to peaceably enjoy full, exclusive use of his property," is sufficient reason to demand just compensation for interference with property interests, by itself. In the 2003 case, Petitioner asked only for compensation for the many years of trespass, Pet. App. 73a, because she had already filed additional complaints for damages - filings which were provoked by the state court judge's fraud.

### **G. Proceeding Directly to Federal Court**

Petitioner's exhaustive, multiple attempts to protect her Property failed to resolve the flooding by Respondent, who in 2007, began to claim a meritless prescriptive easement, a property regulation. Upon appeal, the state court found a continuing trespass, Pet. App. 9a, 40a, but stated that because Respondent failed to admit responsibility there was no duty, therefore no

compensation, although requested by Petitioner. This denial made it possible to proceed directly to federal court, contrary to the lower courts contention that all state litigation must be exhausted beforehand. Pet. App. 29a Footnote 3.

When the Fifth Amendment is defiantly violated and the state fails to provide just compensation for a taking by government, the litigant may proceed directly to federal court rather than exhausting state appeals. See *City of Monterey v. Del Monte Dunes At Monterey, LTD. et al*, 526 U.S. 687 at 699 (1999):

The Court also found that because the State of California had not provided a compensatory remedy for temporary regulatory takings when the city issued its final denial, See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), Del Monte Dunes was not required to pursue relief in state court as a precondition to federal relief. See 920 F.2d, at 1506-1507.

(See also Appeals Appendix p. 410-411)

#### **H. Duty of Governments**

Petitioner raised the aspect of duty of governments to protect constituents in her initial filing of this Complaint on June 16, 2017 (60):

“Defendant’s failure to fulfill its duty to protect plaintiff or correct the flooding issue also depreciated the value of the property and has prevented plaintiff’s ability to sell the property.



Legal fiduciary precedence requires government entities to be honest in all endeavors, especially during litigation. (389-390) Failure to do so invalidates all previous legal outcomes affected by extrinsic fraud. “Fraud vitiates every thing, and a judgment equally with a contract; that is a judgment obtained directly by fraud...” See *U.S. v. Throckmorton*, 98 U.S. 61, at 68 (1878).

### **I. Disbelief**

Petitioner was held to a heightened form of pleading and subjected to a prejudicial review in the Report and Recommendations of December 14, 2017, due to the judge’s disbelief of fraud allegations in the Complaint, thus denying due process. The magistrate judge stated assumptions, repeatedly in the R & R, which were not his right to make. Pet. App. 8a-27a. Those matters, by right, are for a jury to decide. (433) All premises for his decision to dismiss are invalidated by the Fifth and Fourteenth Amendments to the U.S. Constitution, as well as, legal precedence cited in the Objections to the R & R (389-430) and the later Response to Brief in Opposition. (431-492) Petitioner objected to all portions of the Report, with the exception of the Section on Motion for Sanctions, which affirmed Petitioner’s legal assertions that Respondent’s Motion was improperly submitted. Pet. App. 27a-28a.

Disbelief of fraud allegations conflicts with this Court’s ruling that a judge’s disbelief is not sufficient grounds to dismiss, pursuant to Rule 12 (b) (6). See *Bell Atlantic Corp, et al, v. Twombly*, (No.05-1126), 127 S. Ct. 1955, 1965-1966, U.S. Supreme Ct. (2007):

[T]he pleading must contain something more...than...a statement of facts that merely creates a suspicion [of] a legally cognizable right of action”), on the assumption that all the allegations in the complaint are true (even if doubtful in fact) see, e.g. *Swierkiewicz v. Sorema N.A.* 534 U.S. 506, 508 n.1. 122 S.Ct. 992, 152 L.Ed.2d 1(2002); *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S. Ct. 1827, 104 L.Ed.2d 338 (1989) (“Rule 12 (b) (6) does not countenance...dismissals based on a judge’s disbelief of a complaint’s factual allegations”) *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L.Ed.2d 90 (1974) (a well-pleaded complaint may proceed even if it appears “that a recovery is very remote and unlikely”).

*Twombly* was a Section 1 of the Sherman Act complaint. This excerpt is from this Court’s approval of Petition for A Writ of Certiorari, stating that a judge’s disbelief does not bar the progression of the complaint. (Appellant Appeal Brief p. 34).

#### **J. Extrinsic Fraud and When Intrinsic Fraud Becomes Extrinsic Fraud**

The Magistrate Judge miscomprehended extrinsic fraud. He was also unaware that when a duty-bound government entity withholds or makes false statements in court, intrinsic fraud may become extrinsic fraud. Pet. App. 21a-26a. (389-392).

Extrinsic fraud includes hiding the true facts of the case, false promises of compromise, attempts to keep plaintiff away from court or threats by opposing

counsel (48-52), in order to prevent a litigant from prevailing. Extrinsic fraud runs parallel to the case but is not the subject of a case. It is a pretense of “clean hands”.

A comprehensive history of extrinsic fraud (49-51) is interspersed with other events relevant to the extrinsic fraud. Petitioner states in her complaint (52-54) that the fraud complained of is the hidden origins of the taking and the coverup regarding who installed the pipes and flooding on the property, when and why, which Respondent has never admitted.

Extrinsic fraud denotes that the litigant did not have a “full and fair opportunity to present her case.” *See Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1143 (9<sup>th</sup> Cir.) 2004. Further, when government hides information during the course of litigation, intrinsic fraud may become extrinsic fraud. *See Jorgensen v. Jorgensen*, 32 Cal. 2d 13 (1948).

#### **K. Fraud Upon The Court, *Res Judicata* And *Rooker-Feldman***

The Magistrate Judge has skewed this case to meet the goal of dismissal, by refusing to conclude, Pet. App. 26a, that Petitioner was denied the right to expose the true facts of the taking (315-319, 369-385) by the state court judge.

Petitioner amended the Complaint, specifically to strengthen the area of fraud by the state court judge by including his rulings (302-368) and Complaints to the Judicial Board of 2012. (369-385) Yet, rather than relying on that information indicating that the state

court judge had shielded Respondent from repercussions of a taking, Petitioner was faulted, Pet. App. 19a, 26a, for not raising fraud during the course of the original Complaint of 2003, when, in fact, she had done so but the judge silenced her by saying, "*We are done with that!*" (369-385)

Instead of understanding that Petitioner had been denied Fifth Amendment protections, the District Court, applied the fraud corrupted 2003 suit, Pet. App. 42a-67a, to justify contentions that the state court judge was not biased. Pet. App. 26a.

Subsequently, the R & R chose parts of the original corrupted 2003 suit to dismiss this instant complaint, despite Petitioner's claims that the Complaint was contaminated by fraud.

The state court judge denied Petitioner's right to fully present her case. "litigants must have a "full and fair opportunity" to present their case for *res judicata* to apply." See *Kougasian v. TMSL INC.*, 359 F.3d 1136, 1144 (2004), Ninth Circuit. The state court judge prevented any admission of testimony which would have concluded the litigation, for purposes of protecting Respondent.

Regarding issues of fraud, in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, at 244-246 (1944) this Court held:

*Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office, but the*

*Circuit Court of Appeals. Cf. Marshall v. Holmes, supra.* Proof of the scheme, and of its complete success up to date, is conclusive.

Therefore, none of the conclusions drawn in the R & R, with the exception of the Section on Sanctions, is valid. The Court of Appeals, in turn, has sanctioned such a departure by a lower court. Neither Opinion can be supported by controlling law.

The Court of Appeals, by sanctioning a dismissal, which conflicts with Supreme Court and District Court findings in other cases, has emboldened Respondent to continue flooding the property without repercussion or compensation, thus failing to hold Respondent accountable for its pursuit of an escape from just compensation, by failing to uphold the Fifth Amendment. Even now, the federal courts have failed to understand the severity of the taking and devastation of an entire private property for purposes of disposal of public flooding.

Petitioner has been subjected to a prejudicial review by the lower federal courts, which weakens and threatens the guarantees provided by the U. S. Constitution, to all private property owners thus denying due process and possibly endangering others, as she has been endangered.

**III. The Question of Whether All Following Lawsuits Stemming from the Original Complaint, Based On That Suit And The Same Facts, Were Equally Corrupted by Fraud.**

This case presents the opportunity for this Court to resolve an infrequent but nonetheless important question as to the impact of fraud not only in an original suit but on all following suits, when Respondent, knowingly, presents rulings corrupted by fraud from the original suit in order to succeed, during long standing violations of the United States Constitution which cripples a litigant's rights to prevail.

The Complaint was filed on June 16, 2017, for Extrinsic Fraud and Fraud Upon the Court. The state court judge refused to allow testimony from Injunction Hearings, which established that Respondent had illegally installed the pipes on the Property in the 1980's. Petitioner contends that all following complaints, based on the original suit were also corrupted by Fraud Upon the Court

Respondent's Extrinsic Fraud is proven by its refusal to admit that the testimony during the Injunction Hearings was correct. Or to disclose governmental corruption which prompted the taking of the Property. Petitioner contends that these frauds corrupted all Complaints and requests that each be vacated.

In *Marshall v. Homes*, 141 U.S. 589, at 590-596 (1891), a similar situation occurred. A number of suits were filed by Mrs. Marshall, which, after adjudication, were all held by David Mayer. "Mayer appeared and

filed exceptions and pleas of estoppel and *res judicata*.” (592) Marshall claimed that Mayer had forged a letter and would not have gained the judgments except for the fraud. “The judgments aggregate more than three thousand dollars. They are all held by Mayer and are all against Marshall. Their validity depends on the same set of facts. If she is entitled to relief against one of the judgments, she is entitled to relief against all of them.” (595)

Therefore, “any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.” (596)

This Opinion in *Marshall v. Holmes*, supports Petitioner’s contention that the original fraud-tainted Complaint of 2003, corrupted all following suits in which Respondent, a participant in the fraud, prevailed by using the same set of facts claiming the same litigants, therefore, all following suits including the federal cases are rendered invalid by virtue of recurring fraud in all.

Extrinsic fraud and fraud upon the court, occurred on the state level, therefore, making all state judgments invalid, concluding that *res judicata* cannot apply to the federal court decisions because the state level judgments were contaminated by extrinsic fraud and fraud upon the court.

Petitioner requests the Court to determine an answer to this important question.

**CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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